# *INDIA - MEASURES AFFECTING THE AUTOMOTIVE SECTOR (WT/DS146-175)*

## Response of the United States to Questions from the Panel April 10, 2001

**Questions to the United States:**

*Measures at issue*

**Question 1**

**Could the United States please clarify the exact scope of its complaint, in light of the terms of its request for establishment of a panel[1], and of the statements in the United States' first submission and opening statement at the first meeting with the Panel. For example, paragraph 14 of your first written submission indicates that "the United States challenges the indigenization requirements and the trade balancing requirement that the Government of India imposes through Public Notice No 60 and the MOUs signed by individual manufacturing companies". In paragraph 6 of the opening statement of the United States, the comment is made that "in this dispute we are challenging two requirements that India imposes on manufacturers of passenger cars"; reference is then made to indigenization and trade or export balancing. Does the United States consider the *measures* at issue to be limited to these two elements, or are its *claims* limited to those two elements? In either event, to what extent can other elements of Public Notice No 60 and the MOUs, as well as the Indian domestic legislation under which they have been implemented or other documents, rules or regulations be considered relevant by the Panel in assessing the matter before it?**

**Answer 1**

1. The measures at issue in this dispute are those set forth in the U.S. panel request:

Public Notice No. 60 ((PN)/97-02) of the Indian Ministry of Commerce, published in the Gazette of India Extraordinary, effective 12 December 1997; the Foreign Trade (Development and Regulation) Act 1992; the Export and Import Policy, 1997-

[1] It is recalled that this request refers to "Public Notice No 60, the Foreign Trade (Development Regulation) Act 1992, the Export and Import Policy 1997-2002, memoranda of understanding signed by the Government of India with manufacturing firms in the motor vehicle sector pursuant to Public Notice No 60, as well as amendments thereto, other legislative and administrative provisions implemented thereby or consolidated therein, and implementing measures or associated administrative actions taken thereunder".

2002; memoranda of understanding signed by the Government of India with manufacturing firms in the motor vehicle sector pursuant to Public Notice No. 60; as well as amendments thereto, other legislative and administrative provisions implemented thereby or consolidated therein, and implementing measures or associated administrative actions taken thereunder.

The U.S. claims relate to the indigenisation requirement and the trade balancing requirement found in these measures.

2. These requirements are directly imposed by Public Notice No. 60 and the MOU's. Other provisions of Indian law are relevant in various ways. For example, they can be relevant because they establish the domestic legal authority for the adoption and maintenance of these measures. In this case, Public Notice No. 60 was issued pursuant to the Exim Policy, the authority for which derives from the FT(DR) Act. Provisions of Indian law are also relevant when they provide the domestic legal authority for the binding and enforceable nature of these measures. In this case, Indian contract law, the FT(DR) Act, and the Customs Act 1962 all are relevant for that reason.

**Question 2**

**Could you please clarify:**

**(a) whether you are requesting this Panel to make findings exclusively with respect to the measures as they were applied at the date of establishment of this Panel and have been applied before 1 April 2001?**

**Answer 2(a)**

3. We are requesting the Panel to make findings with respect to the indigenisation requirement and the trade balancing requirement as such. Those requirements were in existence at the time the panel was established, and remain in existence today. There is therefore no distinction to be drawn between the measures as they existed at the time of Panel establishment and now.

**(b) in your view, and in light of India's description of the situation after 1 April 2001, are these measures the same as those that will apply after 1 April 2001?**

**Answer 2(b)**

4. As long as the MOUs remain in force, the relevant aspects of the measures at issue will remain the same even if, as of April 1, 2001, new imports of CKD/SKD kits no longer require an

import license. We also note that, as of the date of this submission, it appears that Public Notice No. 60 still remains in effect.[2]

**(c) in your view, to what extent should the Panel take into account developments after 1 April 2001 in its assessment of the matter before it?**

**Answer 2(c)**

5. Developments after April 1, 2001, will not affect the United States' legal claims in this dispute. These claims relate to the indigenization and trade balancing requirements of the measures at issue -- which remain in effect -- and not to the form of the mechanisms by which these requirements are enforced.

***Res judicata***

**Question 3**

**India invokes the principle of *res judicata.* What is, in your view, the role of this principle in WTO dispute settlement ? If it is relevant, what are the elements a panel should consider in determining whether the principle applies to the facts before it? What degree of similitude or "difference" must there be in either the facts or the legal issues to allow or prevent its application?**

**Answer 3**

6. The United States notes that the Panel has also asked India to answer this question. We hope that India's answer will clarify what it meant by its use of the term *res judicata,* because while India referred to this "principle" in its first submission (as the Panel notes), India nowhere defined it. It is therefore not entirely clear what India had in mind when it used the term. Generally speaking, however, a principle of *res judicata*, if applicable, would presumably relate to the effect of a previously adopted panel report on a subsequent dispute involving the same matter between the same parties.

7. This dispute quite simply does not present that issue. As the United States has explained (and is discussed further in answers 4 and 5 below), the measures challenged in this dispute are not measures that were the subject of the *India-QR's* case, and the claims at issue in this dispute were not claims at issue in that one. In the terminology of DSU Article 7.1, the "matters" in the

[2] Based on a visit today to the website of the Indian Directorate General of Foreign Trade, <http://dgft.delhi.nic.in>, at which the DGFT's Public Notices are posted, no public notice rescinding Public Notice No. 60 has been issued.

two disputes are different,[3] and therefore this dispute was not even addressed, let alone resolved, by that prior panel.

8. Therefore, the Panel should decline to undertake to clarify a legal issue that is neither presented by the facts before it nor necessary to the resolution of this dispute.

**Question 4**

**Could you clarify whether, in your view, the implementation of the results of the *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products ("India-QRs")* dispute requires, or not, the elimination of part or all of the measures referred to this Panel for examination?**

**Answer 4**

9. In the United States' view, the *India-QR's* panel did not examine the measures that have been referred to this panel; consequently, the DSB recommendations and rulings in that dispute would not have required India to bring these measures into compliance. We have asked India whether they share this view, or whether, since these measures remain in force after the end of the reasonable period of time for compliance in that dispute, India believes instead that the United States is entitled to request authorization to suspend concessions in accordance with Article 22 of the DSU on the basis of the *India-QR's* ruling.

**Question 5**

**To what extent should the Panel be aided in any determination of the scope of the *India – QRs* dispute, by the outline of the parties' positions and the findings in that dispute, as reflected in particular in paragraphs 2.9, 3.7, 3.9, 3.12, 3.18, 3.38 to 3.42, 5.1, 5.14, 5.122, 5.125, 5.144 and 6.1 of the Panel Report (WT/DS90/R).**

**Answer 5**

10. To the extent that this Panel undertakes to examine the scope of the *India-QR's* dispute, the parties' statements and the panel's findings in the *India-QR's* panel report make it quite clear that the subject of this dispute was not the subject of that one.

11. The *India-QR's* dispute centered on whether India could maintain its overall network of quantitative restrictions taken for balance-of-payments reasons on 2,714 tariff items -- not on the details of the various licensing schemes for individual items. As paragraph 3.9 of the report

[3] "The '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)." Report of the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted on 25 November 1998, para. 72.

makes clear, the United States claimed that "Most imports into India remained subject to an *arbitrary, non-transparent and discretionary* import licensing regime; formal quotas did not exist. Persons wishing to import an item on the Negative List had to apply for a license and explain their 'justification for import': *the authorities provided no explanation of the criteria for judging applications*, and no advance notice of the volume or value of imports to be allowed" (emphasis added). Paragraphs 3.18 and 3.20 make it equally clear that the United States focused on the very fact that the licensing system lacked criteria (and not on the contents of criteria in individual cases):

> When the United States had asked India, during the consultations in this dispute, what criteria were used to evaluate granting a licence for a restricted product, the Indian Government had responded simply that "The applications for import licences under this category are placed before a Special Licensing Committee for consideration."
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> [...]
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> Thus, according to the United States, the generally applicable import licensing process was a complete black box for the importer and for the foreign exporter. No information was provided on the Government's sectoral priorities with respect to products or on what its views of "merit" might be. All that the United States knew was that the Indian licensing authority generally refused to grant import licences for "restricted" items when it was considered prejudicial to the state's interest to do so.

12. Paragraph 3.13 makes clear that it was the existence of non-automatic licensing *as such* -- and not the specific criteria for licensing individual imports -- that was at the heart of the United States' claim under GATT Article XI:

> The United States noted that the measures that were the subject of this dispute were "restrictions other than duties, taxes or charges" as defined in Article XI:1. It pointed out that the GATT had on many occasions recognized that discretionary or non-automatic import licensing constituted a quantitative restriction on trade under Article XI:1.

13. Paragraphs 3.40 and 3.41 of the report make clear that India did not think otherwise: "... the United States had not invoked any of these provisions - not even subsidiarily in case the Panel were to find India's import restrictions to be covered by Article XVIII:B - , *which implied that the scope of this proceeding did not include the administration of the import restrictions ...* India concluded that the United States invoked the dispute settlement procedures only with respect to the justification of the import restrictions and not in respect of matters arising from their application. *India, therefore, reserved its position on the allegations of the United States with respect to the application of India's import restrictions, in terms of both their factual basis and their legal implications*" (emphasis added).

14. The panel's findings accorded with this view of the scope of the dispute. After describing a number of GATT panel reports on the interpretation of Article XI:1, the panel concluded as follows:

> ... These reports are consistent with the ordinary meaning noted above, as discretionary or non-automatic licensing systems *by their very nature* operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, *we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1.*
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> In light of the foregoing, we note that it is agreed that *India's licensing system for goods in the Negative List of Imports is a discretionary import licensing system, in that licences are not granted in all cases, but rather on unspecified "merits"*. We note also that India concedes *this measure* is an import restriction under Article XI:1.
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> In light of these elements, we find that the import licensing system maintained by India for the products found in Annex II of the Negative List of Imports, to the extent that it applies to the products specified in WT/BOP/N/24, Annex I, Part B, operates as a restriction on imports within the meaning of Article XI:1.[4]

15. By contrast, the present dispute does not concern India's system of non-automatic licensing. It concerns instead different measures (Public Notice No. 60 and the MOU's) and different requirements (the indigenisation requirement and the trade balancing requirement) that India imposes on car manufacturers and on automotive parts and components. Those measures and requirements came into force after the import licensing regime was put in place, and, as India acknowledges, will remain in force after the import licensing regime expires. Moreover, those requirements exist because car manufacturers undertook to comply with them in order to obtain relief from the measures at issue in the *India-QR's* dispute -- but that point only confirms that the measures at issue here are different from the ones that *India-QR's* considered. Furthermore, those requirements do impose restrictions on imports, but those specific restrictions (a limitation based on ability to export, and a limitation based on degree of local content) are different from the very existence of non-automatic licensing that was at issue in the *India-QR's* dispute. And those requirements treat imported goods less favorably than like domestic goods -- a claim that even India realizes was not and could not have been a part of the *India-QR's* dispute.

16. Consequently, the "matter" before this Panel -- both the measures and the claims with respect to those measures -- is not the matter the *India-QR's* panel examined.

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[4] Panel Report in *India-QR's*, WT/DS90/R, adopted on 22 September 1999, paras. 5.129-5.131 (footnotes omitted) (emphasis added).

## Question 6

**In your view, did the parameters stipulated in the year 1995 for import of CKD/SKD kits/components, as referred to in Public Notice No 60, fall within the notion of "discretionary import licensing" or "special import licensing" dealt with in that dispute?**

## Answer 6

17. No. The prohibition as such on importation of CKD/SKD kits fell within the notion of "discretionary import licensing" and "special import licensing" (or "SIL's") as those terms were used in the *India-QR's* dispute. Any specific parameters pursuant to which such licenses might be granted were not dealt with in that dispute.

18. In any event, according to India, no such parameters were actually issued: "No parameters were laid down in the year 1995 and individual MOUs were entered into with the concerned manufacturers on the basis of their own projections in respect of indigenisation and exchange neutralisation."[5]

## Question 7

**India argues that the « splitting » of a single issue into separate disputes is contrary to general principles of law and to the objectives of the DSU. Could you please comment on this assertion? More specifically, were the Panel to find that the measures before it have already been found to be inconsistent with Article XI of the GATT, could it validly examine a claim of violation of Article III:4 of GATT and Article 2 of the TRIMS Agreement concerning the same measures? What discretion would a panel have not to examine such claims if it found the point to be moot?**

## Answer 7

19. India's first submission asserts that "the principle of the prohibition of abusive splitting [of a subject matter into separate proceedings] must therefore be considered to be an inherent part of the DSU procedures."[6] India provides no legal authority, textual analysis or other rationale for this assertion. This case does not present a division of a single subject matter into two pieces; and in any case, the United States does not find any such "principle" in the DSU or elsewhere in the WTO Agreement.

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[5] *Replies by India to Questions Posed by Japan*, G/TRIMS/W/15, circulated 30 October 1998, answer to question 6; Exhibit US-5.

[6] Para. 49.

20. As we have pointed out earlier, the "matter" at issue in this dispute is an entirely different one from the "matter" at issue in the *India-QR's* case. The measures are different; the claims are different. India's removal of the import licensing at issue in the earlier case will not end the discrimination against foreign goods or the additional import barriers that Public Notice No. 60 and the MOU's impose. These separate violations are ones that this Panel must address; the previous panel did not, and could not, address them. In summary, regardless of the precise meaning of India's "principle", this case does not represent the splitting of a single matter in two.

21. India advanced a similar argument before; it was rejected then and should be rejected now. In the *EC Mailbox* report, the panel noted that India had raised a systemic concern about successive complaints based on the same facts and legal claims; but the Panel concluded that it was not the appropriate forum to address such issues. The Panel considered that it was required to base its findings on the language of the DSU and could not make a ruling *ex aequo et bono* to address a systemic concern divorced from explicit language in the DSU. After reviewing in particular DSU Articles 3.2, 11, and 19.2, that panel found that it was required to reject India's request for dismissal of the complaint.[7] The same considerations apply here: the text of the DSU requires the Panel to examine the matter before it and to clarify the WTO provisions invoked by the parties. Nothing in the language of the DSU authorizes the defense that India is raising.

22. If anything, additional provisions of the DSU, which were not cited in *EC-Mailbox,* support the contrary position. DSU Article 3.7 leaves to the Member's discretion whether or not to bring a dispute; as the Appellate Body noted in the *Bananas* report, "the language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'."[8] Furthermore, that article, as well as Article 7.1, impose no limitation on the scope of a Member's complaint -- a Member may choose to include or omit any claim it has.

23. With respect to mootness: while panels have occasionally refused to rule on measures that expired before the establishment of the panel (and the fixing of the panel's terms of reference), the United States is not aware of any panel that has done so for a measure that was in force when its terms of reference were set. To the contrary, past GATT and WTO panels have ruled on measures that were discontinued during the panel's examination.[9] In this case, furthermore, the measures in question have not become "moot". While India has discontinued import licensing on SKD/CKD kits, it has not discontinued the MOU's. Instead, India has

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[7] Panel Report in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, adopted on 22 September 1998, paras. 7.22-7.23.

[8] Report of the Appellate Body in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted on 25 September 1997, para. 135.

[9] *See* Report of the Panel in *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted as modified by the Appellate Body on other issues on 22 April 1998, para. 6.12. The measure at issue in *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* also expired before the issuance of the Appellate Body report in that dispute. Report of the Appellate Body, WT/DS33/AB/R, adopted on 23 May 1997, page 1.

confirmed that the MOU's remain in effect, binding and enforceable (even if through means other than the import licensing mechanism).

24. For all these reasons, even if the Panel were to find that the requirements at issue here had previously been found to be inconsistent with Article XI (which they were not), it would be incumbent upon this Panel to continue the examination of their compatibility with GATT Article III:4 and Article 2 of the TRIMs Agreement.

**Question 8**

> **What can be, in your view, the relevance of a mutually agreed solution notified to the DSB under article 3.6 of the DSU in subsequent panel proceedings which would concern the same matter ? To what extent should a panel take into account such a solution in its assessment of such a matter?**

**Answer 8**

25. First, regardless whether the mutually agreed solution between the EC and India concerning balance-of-payments restrictions is relevant to the dispute between those two Members, that agreement has no bearing on the United States' rights in this dispute. India's settlement with one WTO Member (such as the EC) cannot excuse a violation that impairs the rights of another Member (such as the United States).

26. Second, the United States considers that a mutually agreed solution -- whether or not notified pursuant to DSU Article 3.6 -- cannot take away the rights of a Member to initiate dispute settlement proceedings. There is nothing in the DSU to the contrary. Mutually agreed solutions do not amend the WTO Agreement. If a Member's measure is inconsistent with that Member's obligations under the WTO, that inconsistency is not "cured" by a mutually agreed solution. Accordingly, the complaining Member must be able to pursue normal dispute settlement proceedings with respect to the measure. Finally, as the EC correctly points out, India's theory, if adopted, would serve as a strong disincentive to ever settle a dispute, contrary to the preference for this outcome expressed in DSU Article 3.7.

***Claims under GATT Articles III:4 and XI***

**Question 9**

> **The United States indicated in its first submission to the Panel and in its oral presentation during the first meeting, that « the measures at issue are not India's import licensing system ». The United States has also clarified, in its oral statement, that « of course, India's import licenses for SKD and CKD kits do play a role in this dispute ». In light of these statements,**

**(a) could you please clarify what exactly the « role » of the import licenses is with respect to each of your claims?**

**Answer 9(a)**

27. The limited relevance of these licenses is that India used them to induce car manufacturers in India to accept the indigenisation and trade balancing requirements. Car manufacturers had to sign an MOU in order to receive those licenses; if they did not sign, they could not import CKD/SKD kits, which -- at the time manufacturers were presented with the MOU's -- could not be imported without such licenses. What is relevant, therefore, is that import licensing existed in 1997 and 1998, when the MOU's were signed. With respect to our legal claims, the import licenses constitute an "advantage" that MOU signatories received in exchange for binding themselves to the indigenisation and trade balancing requirements. In the specific terms of the chapeaux to paragraphs 1 and 2 of the TRIMs Agreement Illustrative List, undertaking to comply with those two requirements was "necessary to obtain an advantage"-- namely, the right to receive import licenses.

28. The situation in the *FIRA* dispute was analogous: permission to establish an investment in Canada was conditioned on compliance after investment with various GATT-inconsistent undertakings. In this dispute, access to the import licenses plays the same role as the permission to invest played in that one: as the "advantage" provided by the government to induce companies to accept the GATT-inconsistent requirements.

**(b) is it, in your view, relevant to the Panels's examination of these claims that the import licensing requirements are expected no longer to exist after 1 April 2001 ?**

**Answer 9(b)**

29. No, it is not relevant to the U.S. claims, for two reasons. First, as long as the MOU's remain in force, the WTO-inconsistent indigenisation and trade balancing requirements remain in force. Second, as India has confirmed, the MOU's, and therefore also those two requirements, are binding and enforceable independently of the import licensing requirements, and will remain so even after the import licensing requirements are removed.

**More generally, what account should the Panel take of the fact that the trade balancing and indigenization requirements are arguably part of a broader scheme?**

**Answer 9(c)**

30. The trade balancing and indigenisation requirements may indeed be part of a broader scheme. (Indeed, paragraph V of the MOU's refers to an "MOU Scheme.") It is not entirely clear what that broader scheme is. In the U.S. view, it is a scheme designed to provide protection to and investment in India's domestic automotive sector, as Indian officials confirmed when they

introduced Public Notice No. 60.[10] To be sure, India has taken a different view. Whatever the case may be, however, the fact that the "MOU Scheme" relates to other Indian policies does not permit India to implement an MOU Scheme that is inconsistent with its WTO obligations. The *FIRA* panel considered a similar issue when it considered the relationship between Canada's broader investment regime and the specific trade issues presented in the dispute. That panel explained that, "in view of the fact that the General Agreement does not prevent Canada from exercising its sovereign right to regulate foreign direct investments, the panel examined the purchase and export undertakings by investors subject to the Foreign Investment Review Act of Canada solely in the light of Canada's trade obligations under the General Agreement."[11] Likewise, this Panel simply needs to examine the indigenisation and trade balancing requirements and their compatibility with India's trade obligations under the WTO Agreement and need not rule on any broader scheme to which those measures relate.

**Question 10**

> **In its oral statement at the first meeting, the United States indicated that "on the one hand, India's licensing regime acts as a total ban on imports. So-called « restricted » items ordinarily cannot be imported at all. That was the basis of the United States' complaint in the *India – QRs* dispute. The present dispute, on the other hand, does not contest that import ban; instead, this dispute challenges the conditions that India attaches to goods imported despite the ban". The United States then mentions by way of example how the indigenization requirement damages, in its view, the competitive position of all parts and components. Could you please elaborate on this reasoning with respect to the trade balancing requirements?**

**Answer 10**

31. Whereas the indigenisation requirement modifies conditions of competition to the detriment of all kinds of automotive parts and components, the trade balancing requirement discriminates only against those automotive parts and components that are imported in SKD or CKD form. The discrimination arises because the trade balancing requirement attaches an obligation to the purchase, sale and use of imported kits and components that is not attached to like domestic goods.

32. Because of the trade balancing requirement, all imported SKD/CKD kits carry with them an obligation to export from India goods (components or finished vehicles) with an FOB value equal to the CIF value of the imported kits. Moreover, this obligation attaches not only to SKD/CKD kits that the manufacturer itself imports, but also to those imported SKD/CKD kits

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[10] *See* First Submission of the United States, paras. 47-48.

[11] Panel Report in *Canada - Administration of the Foreign Investment Review Act ("FIRA")*, L/5504, adopted on 7 February 1984, BISD 30S/140, para. 5.1.

that the manufacturer purchases within India from someone else. Domestically produced kits, on the other hand, are free of this obligation.

33. Consequently, each time a manufacturer uses imported SKD/CKD components rather than like domestic components, it incurs the disruptions to its commercial planning and other costs that result from the export mandate in the trade balancing requirement. All other things being equal, those disruptions and costs are a disincentive to the purchase and use of imported SKD/CKD kits and components. The trade balancing requirement therefore accords less favorable treatment to them.

34. Like one of the measures examined in *EEC - Animal Feed Proteins*, the trade balancing requirement is a measure that imposes a burden on those who use imported goods but not on those who use like domestic goods (the obligation to buy milk powder from intervention agencies in that dispute, the obligation to export finished vehicles or auto parts in this one). As the *Animal Feed Proteins* panel recognized, such a measure is inconsistent with GATT Article III:4.[12]

**Question 11**

> **In its opening statement at the first meeting, the United States indicated that "[WTO Members] want to ensure that India does not impede that access [for their products into India] through an entirely new layer of barriers – such as, in this case, the independent import restrictions and prohibitions contained in Public Notice No 60 and the MOUs" (Opening Statement, paragraph 24). In light of this statement, could you please clarify whether in your view, the indigenization and trade balancing requirements impose import restrictions *as such,* beyond those imposed as a result of the import licensing scheme?**

**Answer 11**

35. In the view of the United States, the indigenisation and trade balancing requirements do impose import restrictions as such, beyond those imposed by India's import licensing.

36. With respect to the *trade balancing* requirement, paragraph 3(iv) of Public Notice No. 60 provides that "From 4th year [*i.e.*, of the MOU] onwards the value of import of CKD/SKD may be regulated with reference to the extent of export obligation fulfilled in the previous years as per the MOU." Paragraph III, clause (vi) of the MOU contains an identical provision. India has confirmed, as recently as in its First Written Submission, that the MOU's are binding and enforceable.[13]

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[12] Report of the Panel in *EEC -- Measures on Animal Feed Proteins*, L/4599, adopted on 14 March 1978, BISD 25S/49, para. 4.10.

[13] First Submission of India, para. 14. See also *Replies by India to Questions Posed by Japan*, G/TRIMS/W/15, circulated 30 October 1998, answer to question 24; Exhibit US-5: "CKD/SKD kits imports would

(continued...)

37. In addition, the first sentence of Paragraph III, clause (vi) provides that "the party [*i.e.*, the MOU signatory] shall achieve a broad neutralization of foreign exchange *over the entire period of the MOU* in terms of balancing between the actual CIF value of imports of CKD/SKD kits/components and the FOB value of exports of cars and auto components over the said period." The first sentence of paragraph 3(iv) of Public Notice No. 60 is an essentially identical provision. These provisions clearly state that the trade balancing obligation extends over the entire period of the MOU. As India has confirmed, however, the MOU's and their requirements continue to remain in force even beyond the elimination of import licensing for SKD/CKD kits and components.

38. Furthermore, the trade balancing requirement restricts imports because it places a maximum limit on the value of an MOU signatory's imports that is equal to the value of the signatory's exports (which, pursuant to paragraph III, clause (vi), the MOU signatory is required to specify). In practical terms, there are limits to the amount of exports which a car manufacturer may be able or willing to make (whether related to its manufacturing capacity or to the demand for its products outside India). Thus, by limiting the amount of a manufacturer's imports to that of its exports, the trade balancing requirement restricts the amount of imports.

39. For all of these reasons, the trade balancing requirement in Public Notice No. 60 and the MOU's impose import restrictions as such, and is therefore inconsistent with Article XI:1 of the GATT 1994 and with Article 2.1 of the TRIMs Agreement.

40. With respect to the *indigenisation* requirement, paragraph 3(iii) of Public Notice No. 60, and paragraph III, clause (iv) of the MOU, require that MOU signatories achieve specified levels of indigenisation in order to be able to import SKD/CKD kits/components. Moreover, it is *India* that has said that the MOU's *as such* are intended to limit the importation of SKD/CKD kits/components when a firm fails to meet the indigenisation requirement: "As all the companies have achieved the desired level of indigenisation during the last two years (since issuance of Public Notice No. 60) the need *to invoke MOU's to impose limitation on them* has not arisen."[14]

41. Thus, to the extent that the MOU's themselves prevent signatories from importing SKD/CKD kits if they do not meet the indigenisation targets, the indigenisation requirement is as such inconsistent with Article XI:1 of the GATT 1994 and with Article 2.1 of the TRIMs Agreement.

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[13] (...continued)
be allowed with reference to the extent of export obligation fulfilled in the previous year. ... There is hardly any discretion involved in determining the extent of import of CKD/SKD kits except by way of considering any genuine problems the company may have faced in achieving the export levels."

[14] India's Answers to Questions by the United States, 13 July 2000, answer to question 5, Exhibit US-11 (underlining in original, other emphasis added).

**Question 12**

**Can the indigenization and trade balancing requirements prior to 1 April 2001 be described as preconditions to obtaining licences? What are they necessary for, or are a precondition to post 1 April 2001?**

**Answer 12**

42. Undertaking the legal obligation to comply with the indigenisation and trade balancing requirements was originally a precondition that manufacturers had to fulfill in order to obtain import licenses for CKD/SKD kits.

43. However, what is relevant to the present dispute is that, both before and after April 1, 2001, those car manufacturers who signed MOU's before April 1 have been and will continue to be subject to the indigenisation and trade balancing requirements. Both after and before April 1, 2001, compliance with these requirements has been necessary in order to comply with Indian law. Because those requirements are legally binding on MOU signatories and enforceable against them, they are measures that this Panel must rule upon.

***Justification under Article XVIII :B***

**Question 13**

**In response to a question from Japan in the Committee on Trade-Related Investment Measures, India stated that "the main purpose of the MOU Policy is the management of balance of payments even while following an open-door policy towards foreign investment which should not lead to a net outflow of foreign exchange" (Exhibit US-5, page 11). Could you please comment on this assertion?**

**Answer 13**

44. The United States is not certain what India meant by that statement. For example, it is not clear how opening the door towards foreign investment might be related to a net outflow of foreign exchange. To the extent that India was concerned about capital outflows, the United States recalls that India had notified the WTO of a separate dividend balancing requirement, which required foreign-owned investments in several industries (including portions of the motor vehicle sector) to earn through exports the foreign exchange necessary to repatriate earnings to their foreign parents.[15] India's assertion is also inconsistent with statements made when Public Notice No. 60 was adopted; at that time, Indian officials described a different purpose for the

[15] *See* First Submission of the United States, para. 125.

MOU's: "The objective of the new policy is to encourage local production of auto-components and thus, bring in modern technology and develop this key segment, explain ministry officials."[16]

45. In any event, India does not have a defense under Article XVIII:B for the measures at issue in this dispute. First, as discussed in the next answer, India did not notify these measures as balance-of-payments measures to the WTO. Second, on December 12, 1997, when Public Notice No. 60 was adopted, India no longer had a balance-of-payments problem justifying the use of the balance-of-payments provisions of the GATT. The International Monetary Fund (IMF) had reached that conclusion several months earlier, in January of 1997,[17] and the *India-QR's* panel reached the conclusion that India had no valid balance-of-payments justification as of November 18, 1997 -- less than a month before Public Notice No. 60 was issued.[18]

**Question 14**

**In your view, if an existing import licensing scheme notified to the Committee on Balance-of-Payments Restrictions is changed significantly, should a new notification be made? May a panel consider an Article XVIII:B defense concerning measures not specifically notified to the Committee or consulted upon in that body?**

**Answer 14**

46. If a Member changes an import licensing scheme that the Member justifies for balance-of-payments reasons, the Member is required to notify the changes to the WTO. Significant changes must be notified within 30 days. These points flow from paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 (the Understanding), which provides that "a Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement." Paragraph 9 of the Understanding also obligates Members applying restrictions for balance-of-payments purposes to furnish to the WTO, on a yearly basis, a consolidated notification that includes all changes in relevant laws, regulations, policy statements or public notices.

47. A panel may consider but should reject an Article XVIII:B defense concerning measures that the defending Member has not notified to the Committee on Balance-of-Payments Restrictions (the Committee). In the *India-QR's* dispute, the Appellate Body found that panels had the competence to review the justification of measures purportedly taken for balance-of-

[16] "Car Makers Have to Sign New MOU's in Accordance with New Automobile Policy", *Business Standard*, December 11, 1997; Exhibit US-22.

[17] Report of the Panel in *India-QR's*, WT/DS90/R, adopted on 22 September 1999, para. 3.225.

[18] *Id.*, paras. 5.160-5.161 and 5.236.

payments purposes, and therefore a panel is empowered to consider such a defense. It would rarely if ever be appropriate, however, for a panel to sustain such a defense if the defending Member had not complied with the procedural requirements of Article XVIII:B and the Understanding. In this case, Public Notice No. 60 entered into effect over three years ago, and India's Article XVIII:B arguments should not be accepted.

**Question 15**

> **In the event that the Panel should consider the justification of the measures submitted to it on the basis of Article XVIII:B of GATT, what account should it take, if any, of the findings and conclusions reached by the panel in the *India – QRs* case ?**

**Answer 15**

48. This Panel should be guided by conclusions reached by the panel in the *EC Mailbox* dispute. That panel considered the extent to which it was bound by the findings of a previous panel on the same measure and found as follows:

> It can thus be concluded that panels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same. In examining dispute WT/DS79 we are not legally bound by the conclusions of the Panel in dispute WT/DS50 as modified by the Appellate Body report. However, in the course of "normal dispute settlement procedures" required under Article 10.4 of the DSU, we will take into account the conclusions and reasoning in the Panel and Appellate Body reports in WT/DS50. Moreover, in our examination, we believe that we should give significant weight to both Article 3.2 of the DSU, which stresses the role of the WTO dispute settlement system in providing security and predictability to the multilateral trading system, and to the need to avoid inconsistent rulings (which concern has been referred to by both parties).[19]

49. Therefore, if the Panel decides to consider the balance-of-payments justification of the measures at issue in this dispute, the Panel should bear in mind that both the panel and the Appellate Body thoroughly analyzed the legal issues in the *India-QR's* case. Furthermore, this Panel should bear in mind that the *India-QR's* panel made a factual finding, after extensive factual submissions, on India's balance-of-payments situation as of November 18, 1997 -- less than thirty days before the adoption of Public Notice No. 60. It would be neither necessary nor appropriate for this Panel to repeat that work. The Panel should of course consider the arguments of the parties, but it should be guided by the panel's and the Appellate Body's factual findings and recent interpretation of the provisions at issue in that case.

[19] WT/DS79/R, para. 7.30.

50. Moreover, the *India-QR's* panel decided that, having regard to both DSU Article 13 and GATT Article XV:2, it would consult with the IMF. After giving both parties an opportunity to comment on a draft, the Panel sent the IMF a letter asking several questions about India's balance-of-payments situation as of November 18, 1997. The IMF's replies confirmed that, as of November 18, 1997, India's reserves were neither declining seriously nor threatened with serious decline; that India's level of foreign currency reserves was adequate; and that India's quantitative restrictions were not needed for balance-of-payments adjustment and should be removed over a relatively short period of time. The IMF also presented additional data for the period ending June 1998; the IMF indicated that this later data corroborated its views.[20] It would be entirely unnecessary to ask the IMF once again for an opinion that it has already given.

**Question 16**

**Could you please indicate what account can or should be taken by the Panel, of the following material in assessing the matter before it:**

**(a) 1998 Trade Policy Review of India;**

**(b) panel findings, party and other submissions and evidence before the panel in the *India-QRs* dispute;**

**(c) post 1 April 2001 governmental decisions and measures relating to Public Notice No 60 and the MOUs?**

**Answer 16**

51. To the extent such information is relevant to understanding the evidence and arguments of the parties, the Panel may take it into account. While the United States has commented in earlier answers on the findings of the *India-QR's* panel, as well as on the relevance to its legal claims of decisions and measures taken after April 1, 2001, it is difficult to say anything more about whether the Panel *should* take any further account of the items listed without knowing more precisely what the Panel has in mind. The United States would be happy to provide the Panel with any additional information it seeks.

[20] Panel Report in *India-QR's*, paras. 3.360, 3.361, 3.367, and 3.368.